

CONNECTICUT FEDERATION OF PLANNING AND ZONING AGENCIES QUARTERLY NEWSLETTER

Spring 2021

Volume XXV, Issue 2

IMPOSSIBILITY TO COMPLY RAISED AS DEFENSE TO ZONING ENFORCEMENT

A judgment of \$125,000 in daily fines plus \$51,674.00 in attorney fees awarded by a trial was reversed by the State Appellate Court. The case concerned the use of a residentially zoned property as a junkyard and processing center for over a period of 5 years. The homeowner used her home in connection with her business, which was to clean out foreclosed properties. She would, under contract with the foreclosing lender, empty a foreclosed home of its contents and then sell or junk these items. Much of this material ended up at her home, where it was first stored indoors and then overflowed into the front and side yards of her property. The award was made under C.G.S. Sec. 8-12, which provides for daily fines as well as an award of attorney fees where the violation is deemed to be willful.

At trial, the homeowner raised the defense that it was impossible for her to comply with the zoning regulations because shortly after the issuance of the operative cease and desist order, her home was destroyed by fire. Due to an investigation regarding the cause of the fire, she was ordered by the police as well as her insurance carrier to not remove anything from the property. The court agreed that these orders did prevent her from complying with the cease and desist order and reversed the

court's decision as to its award of fines and attorney fees on this basis. A new trial was ordered solely on the issue of making a determination as to these issues. In issuing its remand order, the Appellate Court instructed that daily fines in a civil action are limited to a maximum amount of \$100.00 per day. The \$250.00 maximum amount is limited to a criminal conviction for a zoning violation. *See South Windsor v. Lanata, 203 Conn. App. 89 (2021).*

ENFORCEMENT OFFICER CAN MODIFY APPROVED PERMIT

A wetlands permit that was approved by the Commission was later modified by the wetlands enforcement officer. The permit as approved allowed for the construction of a single-family dwelling and an accessory structure as well as the creation of a yard adjacent to some wetlands.

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CONFERENCE WEBINAR

Please join us on April 21, 2021 at 3:30 pm for a webinar. The topic of discussion will focus on the many pending bills before the state legislature which negatively affect local zoning authority. An invitation to this webinar will be emailed to all members on our email list. A notice will also be posted on the Federation's website www.cfpza. We will also take time to recognize those members who received length of service awards and lifetime achievement awards.

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When the applicant wanted to add additional fill so as to create a more level yard, the WEO approved the change. An abutting neighbor appealed this decision to the Commission, which affirmed the decision. An appeal to court followed.

The court found that the WEO acted properly as Connecticut General Statute Sec. 22a-42a(c)(2) provides the Commission with the authority to delegate a decision to approve or extend an activity not within a wetland or watercourse to its duly authorized agent.

The Commission's regulations contained a provision delegating the authority and there was evidence in the record that the WEO possessed the necessary training as required by the state statute. *See Zahid v. Inland Wetlands and Watercourses Agency*, 70 Conn. L. Rptr. 245 (2020).

TIME LIMIT CAN BE PLACED ON SPECIAL PERMITS

While it is well established that a special permit, once it is recorded on the land records, 'runs with the land', can zoning regulations place a time limit on the duration of the permit? The State Appellate Court says yes.

In this case, the commission approved a special permit to construct a retail center. A condition of the approval was that the proposed use must be completed within two years of the approval. The regulations also provided

for renewal of the special permit to allow additional time for completion. When the Commission approved such a renewal application, an abutting property owner appealed claiming that the approval had expired.

The State Appellate Court's review focused on the defense raised by the special permit holder that the permit ran with the land and thus could not expire. In reaching its decision that the permit could expire, the court focused on Connecticut General Statute Sec. 8-2 which provides the Commission with the authority to attach conditions to a special permit "necessary to protect the public health, safety, convenience and property values." The Court found that this statutory language empowers a zoning authority to impose a temporal condition on a special permit such as by requiring the completion of a development attendant to the permitted use within a set time frame. *See International Investors v. Town Plan & Zoning Commission*, 202 Conn. App. 582 (2021).

FAILURE OF A COMMISSION TO ACT IS NOT APPEALABLE TO COURT

When a planning & zoning commission refused to accept a site plan application, an appeal of this action by the commission was appealed to court. The applicant argued that since the commission had failed to render a

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decision on his site plan application within the time period stated in Connecticut General Statutes Sec. 8-3(g)(1) and 8-7d, the court should find its application automatically approved. Instead, the court dismissed the appeal, stating that only a decision could be appealed and that the commission's refusal to accept the application was not a decision.

Instead, the applicant should have filed a mandamus action with the court. This action would request an order from the court that the commission approve the site plan application as required by Connecticut General Statute Sec. 8-3(g)(1) and 8-7d because it failed to make a decision within 65 days of the filing of its application. The court did add that such an order would not be awarded as a matter of right as the court has discretion to deny a request for mandamus. *See B. Metcalf Asphalt Paving Inc. v. Planning & Zoning Commission, 69 Conn. L. Rptr. 24 (2019).*

ZONING LEGISLATION CONTINUES TO ADVANCE

Numerous bills have been submitted to the State legislature which seek to drastically amend our zoning laws by reducing local control and creating State mandates. For example, S.B. 1024 – An Act Concerning Zoning Authority, Certain Design Guidelines, Qualifications of Certain Land Use

Officials and Certain Sewage Disposal Systems, would require that multi-family and single-family housing be treated the same. It would also eliminate a commission's authority to consider the character of the town and replace it with a set of state-imposed guidelines. This bill, as well as many others, will soon emerge from various committees and face a vote before the State Legislature. The Federation asks that you visit our website and also www.ct169strong.org for more information and how to take action to preserve local control over zoning.

ANNOUNCEMENTS

Workshops

At the price of \$180.00 per session for each agency attending, our workshops are an affordable way for your board to 'stay legal'. Each workshop attendee will receive a booklet which sets forth the 'basics' as well as a booklet on good governance which covers conflict of interest and how to run a meeting and a public hearing.

ABOUT THE EDITOR

Steven Byrne is a practicing attorney with an office in Farmington, Connecticut. A principle in the law firm of Byrne & Byrne LLC, he maintains a strong focus in the area of land use law and is available for consultation and representation in all land use matters both at the administrative and court levels.

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